Filed 2/23/09 Graupner v. Select Portfolio Servicing CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CARMEN GRAUPNER et al., Plaintiffs and Appellants, v. SELECT PORTFOLIO SERVICING et al., Defendants and Respondents.	B196401 (Los Angeles County Super. Ct. No. BC318930)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jon M. Mayeda, Judge. Reversed.

Law Offices of Dale K. Galipo and Dale K. Galipo for Plaintiffs and Appellants Carmen and John Graupner.

Duane Morris, Patricia P. Hollenbeck and Heather U. Guerena, for Defendants and Respondents Select Portfolio Servicing, Thomas D. Basmajian and J.P. Morgan Chase Bank, N.A.

Carmen and John Graupner appeal from the judgment entered after the trial court sustained, without leave to amend, the demurrers of Select Portfolio Servicing (Select Portfolio), Thomas D. Basmajian and J.P. Morgan Chase Bank, N.A. (Morgan Chase) to the Graupners' fourth amended complaint. The Graupners, early victims of the subprime mortgage debacle, alleged eight causes of action, including breach of contract and fraud, arising from the foreclosure on their home in July 2003. We affirm the order sustaining the demurrers in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Judicially Noticed Facts*[1]

The Graupners acquired their Apple Valley home through a grant deed executed on March 23, 2001 by Carmen Graupner's aunt, Milagros Arceo.[2] They did not immediately record the deed. By November 2002 the loan obtained by Arceo was more than $15,000 in arrears, prompting issuance of a notice of default to Arceo. A notice of trustee's sale identifying Arceo as the trustor was issued on February 21, 2003 setting the sale for March 13, 2003 (although the sale was later postponed). On July 11, 2003 the

---

[1] Although these facts were omitted from the Graupners' pleadings, they were included in a request for judicial notice (consisting of duly recorded documents relating to the property) filed in support of Select Portfolio's demurrers to the fourth amended complaint. The documents are proper subjects of judicial notice (see Evid. Code, § 452, subd. (h)), and there was no objection to Select Portfolio's request in the trial court or on appeal. Accordingly, we consider these facts in determining whether the demurrers were properly sustained. (See *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20 [demurrer tests sufficiency of complaint based on facts included in the complaint, those subject to judicial notice and those conceded by plaintiffs].)

[2] John Graupner originally acquired the property on May 25, 2000. On February 28, 2001 Carmen Graupner, as John Graupner's spouse, executed a grant deed conveying her community property interest in the property to John as his sole property. On February 28, 2001 John conveyed the property to Arceo by way of grant deed. On March 2, 2001 Arceo executed a deed of trust on the property securing a $440,000 loan obtained by Arceo on February 28, 2001. Attached to the loan documentation was a second home rider, which expressly limited control and occupancy of the property to Arceo. All three documents were recorded on March 9, 2001. Notwithstanding the terms of the rider, Arceo transferred the property back to the Graupners a few weeks later.

Graupners recorded the grant deed transferring the property to them in March 2001. At a trustee's sale on July 28, 2003, the property was sold by credit bid (at the stated amount due) to Bank One, N.A., the predecessor to Morgan Chase. The trustee's deed upon sale was recorded on September 24, 2003.

2. *The Allegations of the Fourth Amended Complaint*

The fourth amended complaint, which is presented on the Judicial Council form for personal injury complaints, asserts causes of action for fraud, breach of contract, breach of the covenant of good faith and fair dealing, intentional infliction of emotional distress, interference with contractual relations and prospective business advantage, abuse of process, negligence and breach of fiduciary duty. The pleading seeks compensatory as well as punitive damages.

The Graupners allege that, as purchasers of the property and successors in interest to Arceo, they assumed her obligations under the note and the status of trustor under the deed of trust.[3] Citing no statutory authority in support of their assertions, they preface their claims with the general allegation that Fairbanks Capital Corporation (the former name of Select Portfolio), "at the direction of Basmajian and Bank One," "engaged in unfair, deceptive, and illegal collection practices with respect to the loan . . . and took actions to foreclose on the . . . property which were not warranted by contract or law."[4]

---

[3] The Graupners also allege Arceo "assigned all of her property rights and rights in this action to the Plaintiffs."

[4] In support of these general allegations the Graupners refer to a November 2003 class action initated by the Federal Trade Commission and the United States Department of Housing and Urban Development alleging deceptive loan and foreclosure practices on the part of Fairbanks and Basmajian. The Graupners allege they were victims of the same deceptive and illegal practices. This bare allegation is insufficient to state a claim in this action, but raises the question whether the Graupners (or Arceo) were members of the referenced class and made any claims in the settlement of the action. (See *United States v. Select Portfolio Servicing, Inc., et al.* (D. Mass., Sept. 4, 2007, CV03-12219) [modified stipulated final judgment and order, available at http://www.ftc.gov/bcp/cases/fairbanks/finalorder.pdf> (as of Feb.23, 2009)].)

As we understand the poorly drafted complaint, the Graupners made the following factual allegations in support of their claims against Select Portfolio, Basmajian and Morgan Chase (collectively "respondents"). On or about March 10, 2003 an agent of one of the named defendants -- neither the person nor the entity is identified -- led the Graupners to believe the loan could be reinstated if they were to make a downpayment of $3,500, followed by 12 payments of approximately $3,500 per month. The Graupners made the first payment of $3,500 but claim respondents breached the forbearance agreement three days later by adding assorted fees and interest (which the Graupners claim were usurious and not properly disclosed), thus raising the monthly payments to roughly $7,000. The Graupners made no further payments on the note but recorded the grant deed from Arceo on July 11, 2003. At some point before the July 28, 2003 trustee sale, of which they claim they were not properly notified, the Graupners allege they made a written offer to redeem the loan that Fairbanks Capital refused to accept.

The foreclosure sale proceeded on July 28, 2003. On the one hand, the Graupners allege respondents fraudulently asserted the sale was final and title had been perfected. On the other hand, the Graupners allege they were told on or about September 22, 2003 (again by an unnamed agent of respondents) the foreclosure would be rescinded "due to [respondents'] acknowledgment that it had been improperly and fraudulently obtained"; and any foreclosure sale or eviction proceeding would be postponed "to at least October 30, 2003 to allow the [Graupners] to secure a third party buyer for the property to pay off the outstanding loan balance." According to the operative pleading, the Graupners found a third-party buyer for the property (the Woodmansees), but the buyers' loan application was rejected after an appraiser submitted a "grossly inadequate" appraisal report "with over 150 verifiable mistakes" that failed to support the loan.

Respondents allegedly breached this second agreement when they filed an unlawful detainer action on October 15, 2003 seeking to evict the Graupners from the property two weeks before the promised deadline. On October 30, 2003, following the rejection of the Woodmansees' loan application, the Graupners allege respondents agreed to provide them with an additional 30 days to find a third-party buyer. This agreement,

too, was breached on November 19, 2003 when Fairbanks Capital filed an application for a writ of possession to evict the Graupners from the property.

3. *The Demurrers and the Order Sustaining Them*

The Graupners filed their original complaint alleging the same causes of action against eight defendants,[5] including the three respondents in this appeal, on July 23, 2004. The complaint alleged the appraisers had either intentionally or negligently appraised the property below its true market value, resulting in the rejection of the Woodmansees' loan application. The Graupners initially served only GRL and Kelly. Kelly demurred to the complaint, and the trial court sustained his demurrer to all causes of action but granted leave to amend on all but the cause of action for abuse of process.

The Graupners filed a first amended complaint, alleging additional facts relating to the defective appraisal, which again was asserted to be the cause of the rejection of the Woodmansees' loan. Kelly successfully demurred to all causes of action except negligence, and the Graupners were allowed leave to amend only the fraud, breach of contract and implied covenant causes of action. Ruiz was dismissed from the action.

The Graupners' second amended complaint added allegations claiming they had been defrauded on July 23, 2003 and, on February 15, 2004, had entered into an oral or written agreement with Fairbanks Capital and Bank One to rescind the foreclosure to allow a third-party purchase. The Graupners also alleged Bank One and Fairbanks Capital concealed the posted sale date from them and failed to advise them of their right to postpone the sale. Kelly, GRL, Morgan Chase, Select Portfolio and Basmajian all demurred to the second amended complaint. At an August 15, 2005 hearing the trial court sustained Kelly's demurrers without leave to amend and GRL's demurrers with leave to amend. Because these rulings required the Graupners to amend the complaint,

---

[5] The original defendants included Bank One National Association (now Morgan Chase), Fairbanks Capital Holding Corp., Fairbanks Capital Corporation (now Select Porfolio), Thomas D. Basmajian, Guaranty Residential Lending (GRL) (the entity that arranged the allegedly defective appraisal), Gary Ruiz (an employee of GRL), Randy Kelly (dba Kelly Appraisal Services) and T.C. Reynolds.

the subsequently scheduled demurrers filed by the remaining defendants were taken off calendar. After prevailing on the demurrers, Kelly filed a motion for judgment on the pleadings on the remaining negligence cause of action asserting, as a matter of law, he owed no duty to the Graupners. The court granted the motion on September 20, 2005.

On August 29, 2005 the Graupners filed their third amended complaint. For the first time the Graupners alleged they became owners of the property through a grant deed executed on March 23, 2001.[6] They also alleged that, on or about February 15, 2004, they had entered into a written or oral agreement with respondents to rescind the foreclosure, an agreement that was breached on or about March 2, 2004. For the first time the Graupners also alleged Bank One and Fairbanks Capital had engaged in deceptive lending practices, citing the federal class action. The remainder of the third amended complaint continued to focus on the actions of the appraisers, again claiming the late delivery of a defective appraisal caused the Woodmansees to lose the loan. GRL, Morgan Chase, Select Portfolio and Basmajian again demurred. The court sustained GRL's demurrer without leave to amend and sustained the remaining demurrers with leave to amend.

The Graupners filed the fourth amended complaint on December 21, 2005. For the first time the Graupners alleged they had made a written tender of reimbursement of the loan that had been declined by Fairbanks Capital. They also identified three separate agreements breached by Fairbanks Capital and Bank One, in contrast to the lone February 2004 agreement to rescind the foreclosure to allow the Graupners to secure a third-party buyer that had been alleged in earlier versions of the complaint. The remaining defendants demurred to the fourth amended complaint, asserting the Graupners lacked standing because they were not parties to the loan, which expressly restricted the use of the property to Arceo; there were no individual charging allegations with respect to Basmajian; allegations contained in the fourth amended complaint contradicted

---

[6] In previous versions of the complaint the Graupners simply alleged Arceo had assigned all of her rights with respect to the property to them.

allegations contained in earlier versions of the complaint; the Graupners had once again failed to state any claims for relief; respondents' conduct was privileged; and the Graupners should not be allowed further opportunities to amend.

The trial court sustained the demurrers without leave to amend on the grounds the allegations did not sufficiently identify who made the alleged misrepresentations to the Graupners (fraud); the complaint failed to allege a valid contractual relationship (breach of contract and the covenant of good faith and fair dealing); the allegations did not support a finding respondents' conduct was extreme or outrageous (intentional infliction of emotional distress); the Graupners had failed to allege respondents were aware of a valid contract between them and a third party (intentional interference with contractual relations); the alleged facts did not demonstrate respondents' conduct was unlawful (abuse of process); and the Graupners failed to allege facts establishing respondents exceeded their role as lenders (negligence).

DISCUSSION

1. *The Standard of Review on Appeal from Demurrer*

On appeal from an order dismissing an action after the sustaining of a demurrer, we independently review the pleading to determine whether the facts alleged state a cause of action under any possible legal theory. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415; *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) We give the complaint a reasonable interpretation, "treat[ing] the demurrer as admitting all material facts properly pleaded," but do not "assume the truth of contentions, deductions or conclusions of law." (*Aubry*, at p. 967; accord, *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) We liberally construe the pleading with a view to substantial justice between the parties. (Code Civ. Proc., § 452; *Kotlar v. Hartford Fire Ins. Co.* (2000) 83 Cal.App.4th 1116, 1120.)

"'Where the complaint is defective, "[i]n the furtherance of justice great liberality should be exercised in permitting a plaintiff to amend his [or her] complaint."'" (*Aubry v. Tri-City Hospital Dist., supra,* 2 Cal.4th at p. 970.) Leave to amend may be granted on appeal even in the absence of a request by the plaintiff to amend the complaint. (*Id.* at

p. 971; see Code Civ. Proc., § 472c, subd. (a).) We determine whether the plaintiff has shown "in what manner he [or she] can amend [the] complaint and how that amendment will change the legal effect of [the] pleading." (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) "[L]eave to amend should *not* be granted where . . . amendment would be futile." (*Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 685; see generally *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 373-374.)

2. *A Summary of Nonjudicial Foreclosure Proceedings*

Civil Code sections 2924 through 2924k[7] "provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust." (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830 (*Moeller*).) In *Moeller* this court summarized the procedures leading to a nonjudicial foreclosure: "Upon default by the trustor [under a deed of trust containing a power of sale], the beneficiary may declare a default and proceed with a nonjudicial foreclosure sale. [Citations.] The foreclosure process is commenced by the recording of a notice of default and election to sell by the trustee. [Citations.] After the notice of default is recorded, the trustee must wait three calendar months before proceeding with the sale. [Citations.] After the 3-month period has elapsed, a notice of sale must be published, posted and mailed 20 days before the sale and recorded 14 days before the sale. [Citations.] The trustee may postpone the sale at any time before the sale is completed. [Citations.] If the sale is postponed, the requisite notices must be given. [Citation.] . . . The property must be sold at public auction to the highest bidder." (*Id.* at p. 830.)

"During the foreclosure process, the debtor/trustor is given several opportunities to cure the default and avoid the loss of the property. First, the trustor is entitled to a period of reinstatement to make the back payments and reinstate the terms of the loan. [Citation.] This period of reinstatement continues until five business days prior to the date of the sale, including any postponement. [Citation.] In addition to the right of

---

[7] Statutory references are to the Civil Code unless otherwise indicated.

reinstatement, the trustor also possesses an equity of redemption, which permits the trustor to pay all sums due prior to the sale of the property at foreclosure and thus avoid the sale. . . . [¶] . . . A properly conducted nonjudicial foreclosure sale constitutes a final adjudication of the rights of the borrower and lender. [Citation.] Once the trustee's sale is completed, the trustor has no further rights of redemption." (*Moeller, supra,* 25 Cal.App.4th at pp. 830-831.)

3. *The Graupners Have Standing To Sue*

Respondents initially challenge the Graupners' standing to bring the lawsuit, asserting the loan obtained by Arceo to purchase the property contained a rider requiring her to maintain control over the property for use as a second home and limiting her ability to transfer the property without the lender's prior written consent.[8] "Real property is transferable even though the title is subject to a mortgage or deed of trust, but the transfer will not eliminate the existence of that encumbrance. Thus, the grantee takes title to the property subject to all deeds of trust and other encumbrances, whether or not the deed so provides." (*Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 438.)

Although we disapprove of what appears to have been an evasive effort by the Graupners to obtain loan funding through Arceo when their own credit was insufficient to secure a loan, they correctly contend they became successor trustors when Arceo transferred the property back to them. Under section 2924(c), subdivision (a)(1), the Graupners, as successors to Arceo, acceded to the status of trustor and held the statutory right to cure the default on the loan. (See, e.g., *Munger v. Moore* (1970) 11 Cal.App.3d 1, 8 ["[p]ursuant to Civil Code section 2924c, such successor has the statutory right to

---

[8] Respondents describe the loan as a "Second Home Rider" rather than a loan secured by a mortgage or deed of trust. Under section 2924, however, "every transfer of an interest in property, other than in trust, made only as security for the performance of another act, is to be deemed a mortgage." The Supreme Court long ago stated, "[t]he intention of the parties must govern, and it matters not what particular form the transaction may take. If the deed is made for the purpose of securing the payment of a debt, it is a mortgage, 'no matter how strong the language of the deed, or any instrument accompanying it, may be.'" (*Beeler v. American Trust Co.* (1944) 24 Cal.2d 1, 20.)

cure a default of the obligation secured by a deed of trust or mortgage within the time therein prescribed"]; *Whitman v. Transtate Title Co.* (1985) 165 Cal.App.3d 312, 321 ["[w]e believe the term 'trustor' as used in [section 2924g,] subdivision (c)(1)[,] was intended to include also the successor in interest to the original trustor who at the time of the impending trustee's sale is the owner of the property to be sold at the trustee's sale"].)

4. *The Fourth Amended Complaint Adequately Alleges a Cause of Action for Wrongful Foreclosure*

As summarized above, the statutory scheme provides the trustor with opportunities to prevent a nonjudicial foreclosure by curing the default. The trustor may make back payments to reinstate the loan until five business days prior to the date of the sale, including any postponement. (§ 2924c, subds. (a)(1), (e); *Napue v. Gor-Mey West, Inc.* (1985) 175 Cal.App.3d 608, 614.) Additionally, the trustor has an equity of redemption, which allows the trustor to pay all amounts due at any time prior to the sale to avoid loss of the property. (§§ 2903, 2905; *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 86-87.)

The fourth amended complaint unambiguously alleges the Graupners attempted to assert their right to redemption and were wrongfully prevented from doing so by Fairbanks Capital: "The Defendants Bank One, Fairbanks and Basmajian interfered with the Plaintiffs' rights as owners, trustors, and successors in interest to the property to their right of equity of redemption, which permits the trustor to pay all sums due prior to the sale of the property at foreclosure, and thus avoid the sale. [¶] . . . The Defendants conducted an improper non-judicial foreclosure of the subject property because the trustee's deed was never delivered and because the plaintiffs were not properly notified in advance of the sale as required by law, and by not continuing the foreclosure sale when the Plaintiffs were attempting to exercise their rights of reinstatement and equity of redemption. [¶] . . . The Defendants, specifically Fairbanks, also did not accept the Plaintiffs' offer of tender to pay the entire balance due on the loan, despite the Plaintiffs' written request." Although on this record it is impossible to tell if the tender made by the

Graupners complied with statutory requirements,[9] the allegation remains sufficient to withstand demurrer.

Technically, we do not view this allegation as supporting a claim for breach of contract because the provisions of sections 2903 and 2905 confer the right of redemption.[10] As explained by one court, "The statutory scheme governing nonjudicial foreclosures does not expand the beneficiary's sale remedy beyond the parties' agreement, but instead provides additional protection to the trustor: 'Statutory provisions regarding the exercise of the power of sale provide substantive rights to the trustor and limit the power of sale for the protection of the trustor.'" (*Bank of America, N.A. v. La Jolla Group II* (2005) 129 Cal.App.4th 706, 712 (*Bank of America*).) The failure of the Graupners, however, to properly title their cause of action as one for wrongful foreclosure is irrelevant. (See, e.g., *Bird, Marella, Boxer & Wolpert v. Superior Court* (2003) 106 Cal.App.4th 419, 427 ["the nature of a cause of action does not depend on the label the plaintiff gives it"]; *Atlantic Mutual Ins. Co. v. J. Lamb, Inc.* (2002) 100 Cal.App.4th 1017, 1034 ["scope of the duty does not depend on the labels given to the causes of action in the third party complaint"]; *Ananda Church of Self-Realization v.*

---

[9] "'The doctrine of tender has been correctly summarized in this fashion: "The rules which govern tenders are strict and are strictly applied, and where the rules are prescribed by statute or rules of court, the tender must be in such form as to comply therewith. The tenderer must do and offer everything that is necessary on his part to complete the transaction, and must fairly make known his purpose without ambiguity, and the act of tender must be such that it needs only acceptance by the one to whom it is made to complete the transaction.'" [Citations.] In other words, with respect to tender, 'it is a debtor's responsibility to make an unambiguous tender of the entire amount due or else suffer the consequence that the tender is of no effect.'" (*Nguyen v. Calhoun, supra,* 105 Cal.App.4th at p. 439.)

[10] Section 2903 states, "Every person, having an interest in property subject to a lien, has a right to redeem it from the lien, at any time after the claim is due, and before his right of redemption is foreclosed. . . ." The procedure for so doing is detailed in section 2905, which provides, "Redemption from a lien is made by performing, or offering to perform, the act for the performance of which it is a security, and paying, or offering to pay, the damages, if any, to which the holder of the lien is entitled for delay."

Massachusetts Bay Ins. Co. (2002) 95 Cal.App.4th 1273, 1281 ["[A] court is not bound by the captions or labels of a cause of action in a pleading. The nature and character of a pleading is to be determined from the *facts alleged*, not the name given by the pleader to the cause of action."].)

The trial court thus erred in failing to allow the Graupners to proceed on this ground. Moreover, to the extent the Graupners allege the foreclosure was defective,[11] those allegations may be addressed as part of this cause of action.

5. *The Trial Court Properly Concluded the Graupners Had Failed To Allege Any Further Causes of Action*

a. *Breach of contract*

The fourth amended complaint alleges three separate oral agreements between the Graupners and respondents. The first allegedly occurred shortly before the originally posted sale date of March 13, 2003. The Graupners allege some unnamed agent of respondents promised they could reinstate the loan by making an initial "downpayment" of $3,500, followed by monthly payments of $3,500 for the next year.[12] The Graupners

---

[11] The Graupners assert respondents acknowledged the foreclosure was defective but fail to identify the nature of any defect. To the extent the Graupners contend the defect arose from respondents' failure to renotice the default and sale after the Graupners recorded their grant deed from Arceo in July 2003, that contention is wrong. Section 2924b requires notice to each trustor or mortgagor or his or her successor in interest whose interest was recorded as of the date of the notice of default. (§ 2924b, subd. (c)(2)(A).) Section 2924g, governing procedures for postponing foreclosure sales, states: "The notice of each postponement and the reason therefor shall be given by public declaration by the trustee at the time and place last appointed for sale. A public declaration of postponement shall also set forth the new date, time, and place of sale and the place of sale shall be the same place as originally fixed by the trustee for the sale. *No other notice of postponement need be given.*" (§ 2924g, subd. (d), italics added.)

[12] Section 2924g, subdivision (c)(1)(C), expressly permits the trustor and beneficiary to enter into a written or oral agreement to postpone a sale. (Cf. *Bank of America, supra*, 129 Cal.App.4th at p. 712 [statutory limit on trustor's right to cure default does not prohibit voluntary reinstatement after prescribed statutory period: "We seriously doubt that the Legislature intended to prevent lenders and borrowers from adjusting delinquencies by mutual consent."].)

made the initial payment but, by their own admission, withdrew from the agreement when respondents presented them with a written forbearance agreement articulating a reinstatement plan including accumulated fees and interest, thus increasing the amount necessary to reinstate the loan.[13] Plainly, there was no meeting of the minds as to the specific terms of the reinstatement agreement; and the Graupners never completed their end of the alleged bargain. (See *Nguyen v. Calhoun, supra,* 105 Cal.App.4th at pp. 444-445 [failure to tender full performance of oral agreement to postpone trustee's sale did not justify invalidation of sale].) The Graupners also may not rest their claim on the alleged payment of $3,500 just days before the original March 2003 sale date. Because that sum was already owed to the beneficiary under the note, it cannot be viewed as consideration sufficient to render the alleged oral agreement enforceable. (See *Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 673 (*Raedeke*) ["[i]n the absence of consideration, a gratuitous oral promise to postpone a sale of property pursuant to the terms of a trust deed ordinarily would be unenforceable under section 1698 [the statute of frauds]"].)

The second and third agreements allegedly arose post-foreclosure and are based on respondents' purported promise to rescind the foreclosure and allow the Graupners to identify a third party (the Woodmansees) to purchase the property. By virtue of these alleged agreements, the Graupners apparently hoped to squeeze within the narrow confines of the Supreme Court's decision in *Raedeke, supra,* 10 Cal.3d 665, in which the Court concluded the trustor's effort in identifying a third-party buyer constituted adequate consideration not contemplated by the loan agreement to allow them to state a cause of action for violation of an oral promise to postpone the sale. (*Id.* at p. 673.) But there are crucial differences between this case and the circumstances presented in *Raedeke.* To begin with, the agreements identified by the Graupners allegedly occurred

---

[13] Again, to the extent the Graupners contend particular fees were improper, they must allege specific statutory or contractual violations within the context of their cause of action for wrongful foreclosure.

after the foreclosure sale. To quote our decision in *Moeller*, "A properly conducted nonjudicial foreclosure sale constitutes a final adjudication of the rights of the borrower and lender. [Citation.] Once the trustee's sale is completed, the trustor has no further rights of redemption." (*Moeller, supra,* 25 Cal.App.4th at p. 831; see also *Melendrez v. D & I Investment, Inc.* (2005) 127 Cal.App.4th 1238, 1250; *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 86-87.) The Graupners argue the sale was not final within the meaning of section 2924h because Fairbanks Capital had failed to record the trustee's deed of sale within 15 days of the sale; but they have cited no authority, nor have we found any, suggesting their substantive rights (for instance, their right of redemption or right to postpone the sale under section 2924g) persisted after the sale date.[14]

Further, in *Raedeke* the trustor was entitled to rely on the trustee's agreement to postpone the sale because the trustor had successfully located a financially responsible buyer. (*Raedeke, supra*, 10 Cal.3d at p. 670.) By their own admission, the Graupners' proposed third-party buyers did not qualify for the loan they sought, not because of anything done by respondents, but because of the failure of the appraiser to deliver a competent appraisal. Consequently, the Graupners failed to comply with their part of the alleged bargain.

As to the third alleged agreement to extend the time for the Graupners to identify a buyer by 30 days, the Graupners have failed to allege any consideration for the oral agreement and are thus precluded from enforcing it. (See *Raedeke, supra,* 10 Cal.3d at p. 673.) Respondents' demurrers were therefore properly sustained to this cause of action.

---

[14] "The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment. . . . Accordingly, every brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 701, p. 769; see *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1116 [plaintiff waived alleged error in appeal from summary judgment by citing only general legal principles without relating them to the evidence].)

b. *Breach of the covenant of good faith and fair dealing*

A covenant of good faith and fair dealing is implied in every contract in California. (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 372; *Andrews v. Mobile Aire Estates* (2005) 125 Cal.App.4th 578, 589.) It "implies a promise that each party will refrain from doing anything to injure the right of the other to receive the benefits of the agreement." (*Aragon-Haas v. Family Security Ins. Services, Inc.* (1991) 231 Cal.App.3d 232, 240.) As the Supreme Court has observed, "The covenant of good faith and fair dealing . . . exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made.* [Citation.] The covenant thus cannot '"be endowed with an existence independent of its contractual underpinnings."' [Citation.] It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350 (*Guz*).)

The Graupners' cause of action for breach of the implied covenant is based on their three alleged oral agreements with respondents. As discussed, none of those oral agreements is enforceable.[15] In the absence of an enforceable contract, there can be no cause of action for breach of the implied covenant. (*Guz*, *supra*, 24 Cal.4th at p. 353.)

---

[15] Plainly, the original loan agreement would be capable of supporting a claim for breach of the implied covenant of good faith. Although respondents argue a mortgage loan, which is a contract based upon an individual's credit, is not assignable (see 1 Witkin: Summary of Cal. Law (10th ed. 2005) Contracts, § 718, p. 803), we need not decide whether the Graupners, who, as successor trustors, were subject to the terms of the loan (see *Munger v. Moore, supra*, 11 Cal.App.3d at p. 8), may allege a breach of the covenant. Under the statutory scheme for nonjudicial foreclosure, the covenant of good faith is coextensive with respondents' duty to conduct the foreclosure proceedings fairly, openly and in good faith. (See, e.g., *Baron v. Colonial Mortgage Service Co.* (1980) 111 Cal.App.3d 316, 323-324 ["Courts have also enunciated a duty in the trustee in the conduct of a sale itself. 'A sale under a power in a mortgage or trust deed must be conducted in strict compliance with the terms of the power. The sale must be made fairly, openly, reasonably, and with due diligence and sound discretion to protect the rights of the mortgagor and others, using all reasonable efforts to secure the best possible or reasonable price.' [Citation.] That duty may thus fairly be said to extend to all

c. *Fraud*

The elements of fraud are a misrepresentation, knowledge of its falsity, intent to defraud, justifiable reliance and resulting damage. (*Universal By-Products, Inc. v. City of Modesto* (1974) 43 Cal.App.3d 145, 151.) "In California, fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations.] 'Thus "'the policy of liberal construction of the pleadings . . . will not ordinarily be invoked . . . .'" [Citation.] . . . This particularity requirement necessitates pleading *facts* which "show how, when, where, to whom, and by what means the representations were tendered."'" (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645; accord, *Murphy v. BDO Seidman, LLP* (2003) 113 Cal.App.4th 687, 692.) The objectives of the particularity requirement are to give the defendant notice of "'definite charges which can be intelligently met,'" and to permit the court to determine whether, "'"on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud."'" (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216-217; accord, *Gil v. Bank of America, N.A.* (2006) 138 Cal.App.4th 1371, 1381.)

The trial court afforded the Graupners four opportunities to meet these requirements. In their latest attempt, the Graupners again failed to identify specific, intentionally misleading statements made by particular people on which the Graupners relied to their detriment. Moreover, the alleged misrepresentations simply track the allegations the foreclosure proceedings were defective, created a contractual obligation we have already found unenforceable or occurred post-sale when respondents' duties to the Graupners had expired. Moreover, the pleading inconsistencies in preceding versions of the complaint highlight the absence of factual allegations sufficient to apprise respondents of the nature of the purportedly fraudulent statements at issue. (See *Manti v. Gunari* (1970) 5 Cal.App.3d 442, 449 [although pleading inconsistent theories of recovery is permissible, "a pleader cannot blow hot and cold as to the *facts* positively

---

participants in the sale, including prospective bidders."]; *Block v. Tobin* (1975) 45 Cal.App.3d 214, 221 [trustee "owes a duty to conduct the sale fairly and openly and to secure the best possible price for the benefit of the trustor"].)

stated"]; accord, *Davaloo v. State Farm Ins. Co.* (2005) 135 Cal.App.4th 409, 418.) Accordingly, the trial court did not err in sustaining respondents' demurrers to this cause of action.

d. *Negligence and breach of fiduciary duty*

The scope and nature of the trustee's duties in a nonjudicial foreclosure proceeding are exclusively defined by the deed of trust and the governing statutes. No other common law duties exist. (*I.E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 287-288; *Residential Capital v. Cal-Western Reconveyance Corp.* (2003) 108 Cal.App.4th 807, 827; see also *Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 335 [trustee in a nonjudicial foreclosure proceeding is not a true trustee with fiduciary duties, but rather a common agent for the trustor and beneficiary].) Moreover, the Graupners do not allege any facts that would support the inference of a separately assumed duty to them as successor trustors. Consequently, the trial court correctly sustained respondents' demurrers to the negligence and breach of fiduciary duty causes of action.

e. *Intentional infliction of emotional distress*

"The elements of a prima facie case of intentional infliction of emotional distress consist of: (1) extreme and outrageous conduct by the defendant with the intent to cause, or reckless disregard for the probability of causing, emotional distress; (2) suffering of severe or extreme emotional distress by the plaintiff; and (3) the plaintiff's emotional distress is actually and proximately the result of defendant's outrageous conduct." (*Conley v. Roman Catholic Archbishop* (2000) 85 Cal.App.4th 1126, 1133.) Extreme and outrageous conduct is behavior "'so extreme as to exceed all bounds of that usually tolerated in a civilized community.'" (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001.) """[I]t is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery."""" (*Fowler v. Varian Associates, Inc.* (1987) 196 Cal.App.3d 34, 44.)

We agree with the trial court the Graupners have failed to allege any conduct on the part of respondents that can reasonably be regarded as "extreme and outrageous."

Having failed to allege adequate facts to support a cause of action for fraud, we see no error by the trial court in sustaining respondents' demurrers to this cause of action.

f. *Interference with contractual relations*

The elements of a cause of action for intentional interference with contract are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.)

The Graupners contend they had "contractual relations" with the Woodmansees, the prospective third-party buyers of the property, and respondents interfered with that agreement by breaching their oral agreements with, and their fiduciary duties to, the Graupners. Insofar as we have concluded the Graupners had no enforceable agreements with respondents and could not state a claim for breach of fiduciary duty, the Graupners' conclusory allegations of interference are not actionable.

g. *Abuse of process*

The tort of abuse of process is the improper use of the machinery of the legal system for an ulterior motive. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1014.) The tort's essence is "'misuse of the power of the court; it is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice.'" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057; see also *ComputerXpress, Inc.*, at p. 1014 ["[b]ecause the purpose of the tort [of abuse of process] is 'to preserve the integrity of the court,' it 'requires a misuse of a *judicial* process . . .'"].) To establish a cause of action for abuse of process, the plaintiff must demonstrate both a willful act in the use of process not proper in the regular conduct of the proceedings and an ulterior motive. (*Rusheen*, at p. 1057; *Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1579.)

The Graupners allege the foreclosure and eviction proceedings were done in a "wrongful manner" with the "specific intention of wrongfully removing the plaintiffs from the property and depriving the plaintiffs the right to keep the property." Whatever

claims the Graupners may have arising from these proceedings, abuse of process is not one of them. Respondents correctly used the process as intended, both to accomplish a nonjudicial foreclosure and to evict the Graupners from the property after they refused to leave. (See *Spellens v. Spellens* (1957) 49 Cal.2d 210, 232 ["'[s]ome definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions'"].)

6. *The Trial Court Did Not Err in Sustaining Basmajian's Demurrer*

In *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, the Supreme Court recognized that corporate directors may be "jointly liable with the corporation and may be joined as defendants if they personally directed or participated in the tortious conduct." (*Id.* at p. 504.) "Their liability, if any, stems from their own tortious conduct, not from their status as directors or officers of the enterprise." (*Id.* at p. 503; accord, *Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1089.) "[B]oilerplate allegations of conspiracy do not alter the situation. '"Agents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage."'" (*Reynolds*, at p. 1090; cf. *Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 829 [boilerplate allegation in complaint that each defendant was the agent and employee of the others and charging allegations referring to "'defendants and each of them'" did not result in complaint stating a cause of action against individual not mentioned in body of complaint; adding that individual's name to the complaint's caption did not help state a cause of action because "'the caption of the complaint constitutes no part of the statement of the cause of action'"].)

The Graupners have failed in the fourth amended complaint to identify any action taken personally by Basmajian. The mere reference to an injunction entered in a different action is insufficient to bind Basmajian in this action.

7. *The Trial Court Acted Within Its Discretion in Denying Leave To Amend on the Defectively Pleaded Causes of Action and May Condition Amendment of the Surviving Cause of Action on the Graupners' Showing of Good Faith*

As we acknowledge above, "[i]f there is any reasonable possibility that the plaintiff can state a good cause of action, it is error to sustain a demurrer without leave to amend." (*Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 245; see *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 [leave to amend should be granted when the plaintiff has demonstrated a "reasonable possibility" that he or she can amend any of her claims to state viable causes of action].)

The trial court, however, has every right to guard against sham pleadings and to prevent abuse of the litigation process. For example, the trial court has discretion to deny leave to amend when the proposed amendment omits or contradicts harmful facts pleaded in a prior pleading unless a showing is made of mistake or other sufficient excuse for changing the facts. Absent such a showing, the proposed pleading may be treated as a sham. (*Vallejo Development Co. v. Beck Development Co*. (1994) 24 Cal.App.4th 929, 946; *Amid v. Hawthorne Community Medical Group, Inc.* (1989) 212 Cal.App.3d 1383, 1390.) "The well-established rule is that a proposed amendment which contradicts allegations in an earlier pleading will not be allowed in the absence of 'very satisfactory evidence' upon which it is 'clearly shown that the earlier pleading is the result of mistake or inadvertence.'" (*American Advertising & Sales Co. v. Mid-Western Transport* (1984) 152 Cal.App.3d 875, 879; accord, *Reichert v. General Ins. Co*. (1968) 68 Cal.2d 822, 836.) Ordinarily a court will permit an amendment to cure a mistake or inadvertent allegation, but it "is not required to accept an amended complaint that is not filed in good faith, is frivolous or sham." (*American Advertising & Sales Co.*, at p. 878.)

The Graupners' sole potentially viable claim of wrongful foreclosure is premised upon respondents' alleged rejection of their tender of the full loan amount, an allegation curiously omitted from all previous versions of the complaint. We cannot, on this record, conclude this allegation was not made in good faith. Accordingly, the case may proceed based on their claim. We note, however, the trial court possesses powerful tools to shield

other parties, as well as nonparties, from abusive litigation tactics. For example, the trial court could issue orders initially limiting any discovery to the issue of redemption and imposing strict controls on the order, timing and scope of that discovery. Then, if appropriate, the court could schedule an early hearing on a motion for summary judgment regarding the wrongful foreclosure claim. In addition, if there is reason to believe the amendments to the complaint are being presented for an improper purpose, sanctions may be available under Code of Civil Procedure section 128.7 (see generally *Day v. Collingwood* (2006) 144 Cal.App.4th 1116; *Banks v. Hathaway* (2002) 97 Cal.App.4th 949), as well as Code of Civil Procedure section 128.5 (see generally *Palm Valley Homeowners Assn., Inc. v. Design MTC* (2000) 85 Cal.App.4th 553, 562-563). We leave these matters to the trial court to consider upon remand.

DISPOSITION

The judgment is reversed, and the matter remanded for proceedings not inconsistent with this opinion. All parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.